STATE OF MICHIGAN

COURT OF APPEALS

MARK SCHAFFER EXCAVATING & TRUCKING, INC.,	UNPUBLISHED June 21, 2005
Plaintiff/Counter Defendant-Appellant/Cross Appellee,	
v	No. 254622 Lapeer Circuit Court
BARRETT PAVING MATERIALS, INC.,	LC No. 00-028924-CH
Defendant/Counter Plaintiff-Appellee/Cross Appellant.	

Before: Owens, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of no cause of action entered after a jury trial. Defendant cross-appeals as of right from the trial court's directed verdict in plaintiff's favor on its counterclaim for fraud. We affirm.

This case arises out of a contract under which plaintiff agreed to crush rock at defendant's sand and gravel pit, for which plaintiff was to be paid by the ton. At some point, a dispute arose concerning how to measure the material. Plaintiff measured by weighing sample buckets of raw material and counting how many buckets were processed, whereas defendant weighed the processed material on certified scales and surveyed material left on the ground. Eventually, a discrepancy of 17,692 tons was identified between plaintiff's and defendant's measurements. Defendant refused to pay plaintiff's fourth and final invoice and alleged that plaintiff fraudulently overbilled on the first three invoices. Plaintiff alleged that defendant wrongfully refused to pay its obligation under the contract.

Plaintiff argues on appeal that a clause in the parties' contract should have precluded defendant from presenting evidence at trial as to the ways tonnages can be measured, including counting buckets, certified scales, and surveys, as well as their relative reliabilities and uses in the trade. We disagree. Review of a trial court's decision whether to admit evidence is reviewed for an abuse of discretion, although interpretation of the rules of evidence is de novo. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002). We also review de novo the proper interpretation of a contract, including a trial court's determination whether contract language is ambiguous. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003).

The trial court concluded that the contract contains no provision specifying or suggesting how the material is to be weighed. We agree. Because the material must be weighed in order to calculate payment, measurement is essential to completion of the contract. Nonetheless, the contract is silent on the subject. While "[s]ilence does not equal ambiguity if the law provides a rule to be applied in the absence of a provision to the contrary," *Norman v Norman*, 201 Mich App 182, 184; 506 NW2d 254 (1993), we can find no rule to apply here. Therefore, we agree with the trial court that the contract is ambiguous and that extrinsic evidence on the issue of the parties' intent was generally admissible. *See Klapp*, *supra* at 469-470.

Plaintiff argues that much of the evidence presented regarding the possible methodologies for measuring tonnage constitutes "usage of the trade," and that such customary practices are specifically excluded by the contract as evidence of the parties' intent. Plaintiff notes that the contract provides as follows: "No modification of this order shall be effective without Buyer's written consent. No course of prior dealing, no usage of the trade and no course of performance shall be used to modify, supplement, or explain any terms used in this order." This clause explicitly precludes modification, supplementation, or explanation of terms used in the contract. However, the evidence under discussion was presented to resolve an ambiguity created by *omission* of a term. Thus, even if the evidence in issue was "usage of the trade," the clause did not preclude its use to determine the parties' intent regarding a term not used in the contract.

Plaintiff also argues that the trial court erred in preventing it from cross-examining a witness regarding the above clause. However, after a discussion with the trial court, plaintiff withdrew its request to have the witness read the clause and, thus, the trial court made no ruling on the issue. "Error to be reversible must be error of the trial judge; not error to which the aggrieved appellant has contributed by planned or neglectful omission of action on his part." *Smith v Musgrove*, 372 Mich 329, 337; 125 NW2d 869 (1964). Under these circumstances, we find no error on the part of the trial court to review.

Plaintiff finally argues that the trial court erred when it redacted the copy of the contract given to the jury by removing the second sentence of the above clause. We disagree. Plaintiff's arguments regarding enforcement of contracts as they are written, see, e.g., *Busch v Holmes*, 256 Mich App 4, 7-8; 662 NW2d 64 (2003), are inapplicable. The jury was not presented with an issue of interpreting or enforcing a contractual term, but rather with determining the parties' intent regarding a term *not* found in the agreement. Therefore, whether the parties' agreement permitted modification, supplementation, or explanation of terms in the contract by use of extrinsic evidence is not a fact that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." MRE 401. The evidence is therefore inadmissible. MRE 402. Furthermore, extrinsic evidence is necessary to determine the parties' intent, but the redacted clause could be interpreted as precluding extrinsic evidence. Accordingly, the trial court did not abuse its discretion in excluding it because of a danger of confusing or misleading the jury that substantially outweighed the clause's negligible probative value. MRE 403.

On cross-appeal, defendant argues that the trial court erred in granting a directed verdict in plaintiff's favor on its counterclaim of fraud. We disagree. A trial court's decision on a motion for a directed verdict is reviewed de novo to determine whether all of the evidence and inferences, viewed in the light most favorable to the nonmovant, fail to establish a claim as a

matter of law. *Sniecinski v Blue Cross and Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003).

We have explained that the elements of fraud are as follows:

> (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage. [*M&D, Inc v WB McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998).]

Defendant's evidence showed that defendant was actually aware, at least by the time the second invoice was submitted, that plaintiff was using an unreliable measurement method, that the amounts on the invoices were inflated, and that plaintiff's operation was using half-full buckets. Indeed, an employee of defendant testified that, based on the discrepancies defendant noted between their measurements and plaintiff's measurements, he conversed with plaintiff's owner about reconciling the differences. Thus, defendant was actually aware that the representations, in the form of the invoices, were false. Therefore, defendant could not have relied on the invoices because "someone who knows that a representation is false cannot rely on that representation." *Phinney v Perlmutter*, 222 Mich App 513, 535; 564 NW2d 532 (1997). Even viewed in the light most favorable to defendant, the fifth element of fraud cannot be established. Although the trial court did not base the directed verdict on the failure to establish the fifth element of a fraud claim, we will not reverse because the trial court reached the correct result. *See Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

Affirmed.

/s/ Donald S. Owens
/s/ Mark J. Cavanagh
/s/ Janet T. Neff